CONSTITUTIONAL COURT OF SOUTH AFRICA

Sasol Chevron Holdings Limited v Commissioner for the South African Revenue Service

CCT 149/2022
Date of Judgment: 3 October 2023

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 3 October 2023 at 10h00, the Constitutional Court handed down judgment in an application for leave to appeal against an order of the Supreme Court of Appeal, dated 22 April 2022, which overturned a decision of the High Court.

The application concerns the interpretation of section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and the procedure for granting Value-Added Tax (VAT) refunds to qualifying purchasers responsible for exporting goods from the Republic of South Africa in terms of the Regulations issued in terms of section 74(1) read with paragraph (d) of the definition of "exported" in section 1(1) of the Value-Added Tax Act 89 of 1991 (VAT Act) (Export Regulations).

The applicant is Sasol Chevron Holdings Limited (Sasol Chevron), a joint venture with no permanent place of business in South Africa. The respondent is the Commissioner for the South African Revenue Service (Commissioner).

In 2014, Sasol Chevron purchased movable goods from Sasol Catalyst, a supplier of bespoke catalysts used in gas-to-liquid plants, for exportation from South Africa to Nigeria. Sasol Catalyst elected to levy tax at a zero rate in terms of section 11(1) of the VAT Act read with Part 2 Section A of the Export Regulations. Regulation 15(1)(a) of the Export Regulations prescribes a 90-day period within which zero-rated goods must be exported. For reasons beyond its control, Sasol Chevron did not export the goods within 90 days. Sasol Catalyst sought an extension of the 90-day period. It later applied for a further extension of the 90-day period. Before the Commissioner ruled on these requests, Sasol Catalyst issued revised tax invoices in which VAT was levied at the standard rate of 15%. These invoices substituted those previously issued at the zero rate. Sasol Chevron paid the

VAT levied by Sasol Catalyst and applied in terms of section 44(9) of the VAT Act for an extension of the period within which to submit an application for a refund of the VAT paid in respect of Sasol Catalyst's revised tax invoices. In a series of letters dated 7 November 2016, 13 June 2017, 6 December 2017 and 26 March 2018, the Commissioner granted extensions of the 90-day period in respect of certain invoices, but ruled that Sasol Chevron was not entitled to apply for a VAT refund. On 21 September 2018, Sasol Chevron filed a review application in terms of PAJA with the Registrar of the High Court. It was served on the Commissioner on the next business day, 25 September 2018.

In the High Court, Sasol Chevron sought the review of the Commissioner's 6 December 2017 decision to the effect that Sasol Chevron is not entitled to a VAT refund. The Commissioner opposed the review application, firstly, on the ground that Sasol Chevron had not complied with section 7(1) of PAJA because the application had been instituted after the 180-day period contemplated in that section. The High Court rejected this preliminary argument on the basis that the date from which to calculate the 180-day period was 26 March 2018, when the Commissioner provided reasons in writing. Therefore, the review application, which was instituted on 21 September 2018, the 179th day after 26 March 2018, was instituted within the period contemplated in section 7(1). On the merits, the High Court held that regulation 6(6)(b) of the Export Regulations, which provides when the Commissioner may extend the period within which an application for a refund may be submitted, applies because Sasol Catalyst incorrectly levied tax at the zero rate. The High Court held further that Part 2 Section A of the Export Regulations, which deals with the obligations of a vendor who elects to supply goods for export at the zero rate, does not apply because, when the invoices were re-issued, the transaction became a Part 1 transaction. Sasol Chevron was therefore entitled to apply for a refund under Part 1 of the Export Regulations.

Sasol Chevron was granted leave to appeal to the Supreme Court of Appeal. The Supreme Court of Appeal held that the impugned decision was taken on 6 December 2017. It also held that the word "institute" in section 7(1) of PAJA, properly interpreted, means to commence review proceedings by issuing the process and effecting service thereof on the decision-maker whose administrative action is impugned. On this basis, the Supreme Court of Appeal held that Sasol Chevron's review application was instituted outside of the 180-day time period provided for in section 7(1) of PAJA and therefore fell to be dismissed. The Supreme Court of Appeal did not consider the merits of the matter.

The following questions arose for determination in this Court. In relation to the interpretation of section 7(1) of PAJA: When does the 180-day period within which review proceedings must be instituted begin to run? Is service on the respondent required in order for a review to have been "instituted"? In relation to the interpretation of the VAT regime, this Court is asked to determine whether an election by a vendor to supply goods at the zero rate in terms of Part 2 Section A of the Export Regulations later prevents an application for a VAT refund in the event that compliance with the time limit prescribed in Part 2 Section A for the export of zero rated goods is not possible for reasons beyond the control of the exporter.

Sasol Chevron argues that the date from which the 180-day period commences is 26 March 2018 because, in its view, this is the date when the Commissioner gave reasons for its decision of 6 December 2017. The Commissioner argues that the decision was conveyed to Sasol Chevron in a VAT ruling dated 7 November 2016 and that any subsequent communication with Sasol Chevron were simply reiterations of the reasons given on that date. In respect of the meaning of the word "institute" in section 7(1) of PAJA, Sasol Chevron argues that the word's ordinary grammatical meaning entails issuance only. Further, that because section 7(1) limits the right of access to courts and the right to administrative justice, it should be interpreted in the least restrictive manner. The Commissioner argues that "institute" entails both issuance and service on the respondent.

In relation to the interpretation of the VAT regime, Sasol Chevron argues that the text of section 11(1)(a)(ii) of the VAT Act confers on a vendor an election to supply goods at the zero rate, subject to the provisos in section 11(1)(a)(ii)(aa) and (bb). The content of the provisos means that this election can be reversed by operation of law. Further, Sasol Chevron argues that the statutory context of section 11(1) is section 44(9) of the VAT Act, which imposes a duty on the Commissioner to provide a refund due under the relevant law – in this case, the Export Regulations. SARS argues that there are two distinct administrative processes which cannot be relied on simultaneously and once a party has elected to follow one administrative process, it is excluded from following the other process in respect of the same goods. SARS argues that once a vendor elects to be regulated by Part 2 of the Export Regulations, it accepts all the obligations arising from those regulations. If a vendor fails to comply with the peremptory requirements of Part 2, it becomes liable for VAT.

In a unanimous judgment written by Theron J (Zondo CJ, Maya DCJ, Kollapen J, Madlanga J, Majiedt J, Makgoka AJ, Rogers J and Van Zyl AJ concurring), the Court held that PAJA gives effect to section 33 of the Constitution and it follows that matters relating to the interpretation and application of PAJA will be a constitutional matter. Furthermore, the interpretation of the VAT regime as it pertains to export goods raises an arguable point of law of general public importance as; the interpretation of the VAT Act and the Export Regulations is a question of law, the VAT regime affects all exporters of goods and is therefore of general public importance, the manner in which SARS collects tax revenue is a matter of concern to all citizens and the issue is arguable, as evidenced by the High Court's interpretation of the applicable legislation which diverges from SARS' practice in terms of the Export Regulations. The Court concluded that it was thus in the interests of justice to grant leave to appeal.

On the merits, the first issue which the Court had to determine was whether Sasol Chevron brought its review application within the period of 180 days allowed by section 7(1)(b) of PAJA. The Court endorsed the reasoning of the Supreme Court of Appeal which held that SARS' letter on 26 March 2018 was merely a recapitulation of the position SARS had adopted since 2016. The Supreme Court of Appeal, relying on *Aurecon South Africa (Pty) Ltd v City of Cape Town* [2015] ZASCA 209 held that the 180-day period in section 7(1) begins to run on the date on which the reasons for the administrative action become known or ought reasonably to have become known to the party seeking its judicial review. This

was confirmed by this Court in *City of Cape Town v Aurecon South Africa (Pty) Ltd* [2017] ZACC 5.

The Court found that Sasol Chevron was in a position to formulate an objection based on the content of the Commissioner's letters of 7 November 2016 and 6 December 2017. Therefore, the reasons for the administrative action were known or ought reasonably to have been known to Sasol Chevron from 6 December 2017, and so the 180-day period began to run from this date.

Lastly, the Court found that the finding in relation to section 7(1)(b) of PAJA was dispositive of the matter, and that it was thus unnecessary to adjudicate the remaining issues in the matter. Accordingly, the appeal was dismissed with costs.